No. 14115

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERTS BROTHERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*), for the enforcement of its order issued against Roberts Brothers, respondent herein, on July 24, 1953, following proceedings under Section 10 of the Act. The Board's decision and order (R. 21–29) [1] are reported in 106 N. L. R. B. No. 74. This Court has jurisdiction of the proceeding under Section 10

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

(e) of the Act, the unfair labor practice having occurred at Eugene, Oregon, within this judicial circuit.[2]

STATEMENT OF THE CASE

I. The Board's findings of fact

Upon charges filed by the Retail Clerk's International Association, A. F. of L., Local 201, hereafter called the Union, the Board found that respondent violated Section 8 (a) (1) of the Act by conducting, at the conclusion of a privileged anti-Union speech, a secret poll among its employees to ascertain whether they desired to be represented by the Union. The facts are undisputed and were stipulated by all the parties. They may be briefly summarized as follows:

On December 3, 1952, the Union sent respondent a letter informing it that the Union "represents a majority of the employees in your Eugene store." The Union also requested that it be notified prior to any meetings of employees called by the respondent (R. 24; 14). About December 6, respondent's store manager, without bothering to reply to the Union, called together all the employees and read to them a prepared speech which advanced reasons for rejecting the Union (R. 24; 11).

[2] Respondent, an Oregon Corporation having its principal office and place of business in Portland, Oregon, operates department stores in Portland, Salem, Corvallis, and Eugene, Oregon. In the twelve-month period preceding the issuance of the complaint herein, respondent caused merchandise valued in excess of $25,000 to be shipped to and through states other than the State of Oregon. The Board found, and the respondent does not deny, that respondent's business affects interstate commerce within the meaning of the Act (R. 23; 7).

Thus, the manager's speech pointed out that, although the employees were free to choose or reject the Union without interference from or discrimination by the respondent, their selection of the Union as a representative would jeopardize the existing "pleasant person to person relationship"; that it might diminish the employees' chances of securing positions with the "less progressive merchants" in town; that the experience of the "Portland people" with a union had led to high dues, restricted commissions, and a decrease in bonuses and other benefits; and that, with a union, the "human and understanding" handling of personnel problems by the respondent would give way to the "impersonal dealings of a third party" (R. 15–21). At the end of the speech, which the Board deemed privileged under Section 8 (c) of the Act (R. 24), the store manager declared (R. 24–25; 20–21):

> We are interested in determining the desires of all of you. I shall pass out a slip of paper on which are typed two words, "Against" and "For." If you desire the Union vote "For." If you are against, place an "X" along side the word "Against." This is a survey to determine your feelings and obviously it will be a secret ballot for our information. I thank you for your kind indulgence during this matter.

Thereupon, one of the employees passed out among the remainder present at the meeting slips of paper which contained the words "For" and "Against." Each employee indicated his preference on the slip

of paper given him without signing his name, and then placed the paper into a box. The store manager counted the ballots after the employees had returned to work. Later in the day, the manager posted a bulletin in the store cafeteria announcing that 16 employees had voted "For," 39 had voted "Against" and 1 ballot was "cast but not counted" (R. 25; 11–12).

At the time of the balloting, there were approximately 44 regular and regular, part-time nonsupervisory employees working in the store. In addition, the store employed approximately 23 temporary employees. It is not ascertainable to what extent temporary employees voted in the balloting, except that the number of votes cast exceeded the total complement of regular and regular, part-time nonsupervisory employees by twelve (R. 25; 12).

II. The Board's conclusion and order

The Board concluded that, in the above circumstances, the employer-conducted poll constituted conduct which violated Section 8 (a) (1) of the Act (R. 27). In support of this conclusion, the Board referred to its reasoning in *Protein Blenders, Inc.*,[3] a similar case decided one month earlier. There the Board pointed out that an employer-conducted poll, even in the absence of other unfair labor practices, tended to have a coercive effect on the employees, and to act as a deterrent to the free exercise of the employees' right to self-organization (pp. 20–23, *infra*).

[3] 105 N. L. R. B. No. 137 (June 30, 1953). The relevant portion of this decision is printed in Appendix B, *infra*, pp. 20–23.

Accordingly the Board entered an order (R. 27–30) which requires respondent to cease and desist from polling its employees to determine their union sentiment, or from, in any other like or related manner, interfering with, restraining, or coercing its employees in the enjoyment of the rights guaranteed by Section 7. The order also required respondent to post the usual notices.

ARGUMENT

The Board properly found that respondent violated Section 8 (a) (1) of the Act by conducting, at the conclusion of an anti-Union speech, a poll to determine whether its employees desired to be represented by the Union

A. Like "mass interrogation," the poll had a coercive tendency

As this Court has noted, employer "interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer had obtained." *N. L. R. B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 904. Such fear and its consequent restraint of union activity is necessarily heightened where the questioning is of a wholesale nature and occurs right after the employer has indicated that he opposes the union. For, while there may be situations where an employee might be expected to pass off an isolated instance of employer interrogation,[4] the impact of the question cannot help but register when the employer has made plain his interest in defeating the union and has gone to the pains of canvassing his entire working force on this issue. See *N. L. R. B.* v.

[4] Cf. *Wayside Press* v. *N. L. R. B.*, 206 F. 2d 862, 864 (C. A. 9).

Syracuse Color Press, Inc., C. A. 2, decided January 5, 1954, 33 L. R. R. M. 2334.

These principles are applicable to the poll here. It amounted to the systematic questioning of virtually all of the store employees—right after respondent's opposition to the Union had been indicated—concerning their preference therefor. Had the inquiry been oral, the aforementioned principles leave little doubt that this type of questioning, at least on such a broad scale, could be expected [5] to engender fear in some employees that, if they disclosed a Union preference, reprisals would likely follow. We submit that the coercive tendency of such mass interrogation is not substantially altered where it occurs through a written poll conducted by a party interested in obtaining a particular result, especially under the conditions which prevailed in this case.

Although the technique used here professedly masks the identity of individual union adherents, experience has shown that employees are likely to fear that ballots may contain hidden identification marks (see *Okey Hosiery Co., Inc.*, 22 N. L. R. B. 792, 798), or that the employer may in some other manner determine how they vote, as by fixing the ballot box so that the ballots lie in the order in which they are

[5] It is well settled that the test of a violation of Section 8 (a) (1) of the Act "is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights under the Act." *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732, 743–744 (C. A. D. C.), certiorari denied, 341 U. S. 914. See also, *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588; *Elastic Stop Nut Co.* v. *N. L. R. B.*, 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

placed in the box. The method of conducting the instant poll reveals, moreover, that it was reasonable to expect that similar fears would beset respondent's employees. Thus, the voting group was relatively small; the employees marked their ballots in the open and while respondent's manager remained in the room; and the ballots were counted after the employees had returned to work (R. 11–12). In these circumstances, respondent's employees would be amply justified in concluding that, even though they did not have to write their name on the ballot, they could not be sure of anonymity.

But, assuming that the poll guaranteed nondisclosure of individual identities, it still conveyed, as the Board has properly recognized (p. 21, *infra*), the "fear of retaliation against the employees as a group, should they oppose the desires of the employer." That is, it is not unlikely that each employee—lacking the assurance of impartiality provided by the presence of neutral observers in Board-conducted elections—might fear that his vote could be the one which gives the Union a majority and thus bring on economic sanctions; hence, he would be induced to "play it safe" and vote as respondent desired.

Similarly, irrespective of whether it revealed individual identities, the poll also exerted coercion on the employees as a group by virtue of its proximity to respondent's anti-Union speech. Thus, even with respect to its own elections, the Board has concluded that such last-minute speeches on company premises impede freedom of choice. The Board has stated its

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rationale for this conclusion as follows (*Peerless Plywood Co.,* 107 N. L. R. B. No. 106, December 22, 1953, 33 L. R. R. M. 1151, 1152):

> It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.

When, as here, a last-minute anti-Union speech is combined with the requirement that the employees immediately commit themselves in a poll exclusively controlled by the speaker—which lacks the Board conducted election's "advantage of impartial supervision and its guarantee of anonymity to employees in expressing their choice by secret ballot" (*N. L. R. B.* v. *Brooks,* 204 F. 2d 899, 903 (C. A. 9), pet. for cert. pending)—the employees' choice is not only impeded but, indeed, coerced. The step from interference "to restraint or intimidation is a short one." *N. L. R. B.* v. *Syracuse Color Press, Inc.,* No. 99

C. A. 2, decided January 5, 1954, 33 L. R. R. M. at 2336.

In sum, as the Second Circuit in *Syracuse Color Press* emphasized with reference to the analogous "mass" interrogation involved therein: "Here the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion" (33 L. R. R. M. at 2336). On the basis of these same factors in the instant case, the Board properly concluded that respondent's poll involved elements of coercion which illegally qualified the full freedom of choice guaranteed to respondent's employees by Section 7 of the Act.[6]

B. The poll also amounted to employer resolution of the question concerning representation

In addition to the coercive impact just described, the employer-poll interferes with the union's organizational effort. Thus, as the Board has pointed out, such polls (p. 22, *infra*):

[6] This conclusion is supported by judicial precedent, which has often recognized and condemned the coercive effect of employer-conducted elections on the issue of union representation. See *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 785–786 (C. A. 9), certiorari denied, 312 U. S. 678; *N. L. R. B.* v. *Tehel Bottling Co.*, 129 F. 2d 250, 252–253 (C. A. 8); *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 181–182 (C. A. 6); *N. L. R. B.* v. *Burry Biscuit Corp.*, 123 F. 2d 540, 541–543 (C. A. 7); *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. 2d 254, 260 (C. A. 3), certiorari denied, 308 U. S. 615; *N. L. R. B.* v. *Sommerville Buick*, 194 F. 2d 56, 58 (C. A. 1).

> * * * force a union to a show of strength under conditions within the control of the employer, and at a stage of organization when employees have not had a full opportunity to persuade their fellow employees to their views concerning union activity * * *

Although an employer need not recognize a union until its majority has been proven, he substantially intrudes upon the right to self-organization guaranteed in Section 7 of the Act when he compels his employees to make a choice this abruptly. For it is firmly established that such guarantee comprehends both the right of employees "fully and freely to discuss and be informed" concerning unionization and the "correlative * * * right of the union * * * to discuss with and inform the employees concerning matters involved in their choice." *Thomas* v. *Collins,* 323 U. S. 516, 534.[7]

Moreover, the voting results unfavorable to the union yielded by the poll, in turn, enable the employer to frustrate the union campaign. As the Board has pointed out (p. 22, *infra*), such results "provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees." Similarly, a "union's failure to secure a majority vote in such a poll tends to cause union adherents to abandon their

[7] To allow ample time for that purpose, it is customary for the Board to provide a 30-day period between the issuance of its direction of election and the actual voting. This, of course, is in addition to the time which elapses between the filing of the petition and the direction.

support of the union and to discourage undecided employees from joining the union." (*Ibid.*)[8]

Accordingly, the employer-poll "in effect resolves the question of representation" (p. 22, *infra*). Despite the fact that an official Board election may still follow and the intervening period may afford the union time in which to attempt a neutralizing of the poll's impact, it is not likely that the initial result forced by the employer can be altered. Just as a union could not be expected in a short period to erase the imprint of an employer's threats or bribes to his employees, so is failure virtually inevitable for the union which must continue its organizing campaign under the shadow of the preliminary defeat sustained in the employer's poll.

In any event, subjecting a self-organizational effort to this hurdle would gratuitously afford the employer an edge that would upset the delicate balance which the Act attempts to draw between the rights guaranteed to employees and the interests of employers. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 797–798. The Act, of course, permits the employer to attempt, by argument or opinion, to persuade the employees to withdraw their support from

[8] The inequity of these consequences is compounded here because, not only were the poll results subject to the element of coercion previously discussed, but they reflected the votes of at least 12, and possibly more, of respondent's temporary employees (R. 12), who might be outside the appropriate bargaining unit and/or be ineligible to vote in a Board conducted election. Furthermore, since the ballots were counted by respondent's manager after the employees had returned to work (R. 11), there is no assurance that even the tally announced was an accurate one.

the union (see p. 13, *infra*). Moreover, if he desires a poll of his employees on the question, the Act permits him, without obtaining the union's consent, to petition the Board for a representation election (Section 9 (c) (1) (B)); or if he is unwilling to wait for a Board election, he may work out with the union some other impartial, but informal, method of verifying the union's claim, such as a check of membership cards or a poll by a neutral body. We submit, however, that there is no justification for permitting the employer—particularly where, as here, there is no compelling business reason for his precipitate action—to require the union's claims to run the gauntlet of an initial coerced vote, taken under conditions exclusively determined and controlled by him.

Hence, not only did the instant poll have a coercive tendency upon the individual voters, but it undermined the Union, thwarted the employees' self-organization effort, and in effect amounted to employer resolution of the representation question.

C. Respondent's defenses are without merit

1. Respondent claimed before the Board that, since no other unfair labor practices were committed by it, the holding of the poll could not be an unfair labor practice. Although the commission of other unfair labor practices often colors related and equivocal activities of an employer, the unfair labor practice found herein stands on its own feet. As we have shown, by eliciting the views of its employees as to Union representation in the shadow of its anti-Union speech, respondent, without more, interfered with and coerced the employees in the exer-

cise of their "complete and unfettered freedom of choice" (*N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 588). Consequently, since Section 8 (a) (1) of the Act prohibits *any* interference, restraint or coercion, a single act of this type is encompassed therein no less than a multitude thereof. See *N. L. R. B.* v. *Syracuse Color Press, Inc.,* No. 99, (C. A. 2), decided January 5, 1954, 33 L. R. R. M. 2334. See also *Berkshire Knitting Mills* v. *N. L. R. B.,* 139 F. 2d 134, 140 (C. A. 3), cert. den., 322 U. S. 747; *Anthony & Sons* v. *N. L. R. B.,* 163 F. 2d 22, 27 (C. A. D. C.), cert. den., 332 U. S. 773. Cf. *Magnolia Petroleum Co.* v. *N. L. R. B.,* 200 F. 2d 148, 150 (C. A. 5).

2. Similarly without merit is respondent's reliance on Section 8 (c) of the Act. Since it has been established that the poll was coercive, it falls outside of this provision which protects only "non-coercive speech." *I. B. E. W.* v. *N. L. R. B.,* 341 U. S. 694, 704. See also, *N. L. R. B.* v. *Syracuse Color Press, Inc., supra,* 33 L. R. R. M. at 2336. Nor does the poll gain any immunity by virtue of the fact the speech preceding it may be protected by Section 8 (c). "Employers still may not under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed them by the Act." *N. L. R. B.* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. A. 5). See also, *N. L. R. B.* v. *Kropp Forge Co.,* 178 F. 2d 822, 828 (C. A. 7), certiorari denied, 340 U. S. 810.

3. The cases principally relied on by respondent before the Board are inapposite. Thus, in *N. L. R. B.*

v. *Kingston,* 172 F. 2d 771 (C. A. 6), the employer, unlike respondent, not only had a valid economic reason for conducting the poll, but he "had expressed no opinion on the merits or demerits of unions, and attempted in no way to discharge or discourage such organization"; indeed, he "was found by the Board to have acted in good faith" (172 F. 2d at 773–774). Obviously, a poll conducted in this setting would be less likely to have a coercive tendency than the instant one, which, as we have shown, was not motivated by pressing business considerations and occurred on the wave of a speech making clear respondent's opposition to the union.[9]

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[9] Cf. *Howard W. Davis d/b/a The Walmac Company*, 106 N. L. R. B. No. 244, decided October 29, 1953, 33 L. R. R. M. 1019. There the Board itself recognized that, when the employer poll is not preceded by an expression of his anti-union sentiment, it may lose its coercive complexion and thus fall outside the ban of Section 8 (a) (1). In arriving at this conclusion in *Walmac*, the Board also emphasized that the poll was occasioned by a rather unusual sequence of events: the union first petitioned the Board for a representation election, and then, despite the employer's willingness for such election withdrew the petition; thereafter, in response to a suggestion from the Board's Regional Director that respondent might on its own be able to resolve its disagreement with the union, the poll was held. See *N. L. R. B.* v. *Eanet*, 179 F. 2d 15, 16, 18 (C. A. D. C.), wherein the Court declined to enforce a Board remedy against an employer poll where, *inter alia*, the employer had been misled into permitting it by the ambiguity of the Board agent's instructions.

That *Walmac* does not control the different factual setting presented here is shown by the circumstance that on January 22, 1954, the Board denied a motion for reconsideration in *Protein Blenders* (the basis for the instant decision). This motion had been predicated on the ground that the intervening decision in *Walmac* had overruled *Protein Blenders.*

In both *N. L. R. B.* v. *Algoma Plywood & Veneer,* 121 F. 2d 602 (C. A. 7), and *N. L. R. B.* v. *Penokee Veneer Co.,* 168 F. 2d 868 (C. A. 7), on the other hand, the employer had recognized the union as the bargaining representative and had been bargaining with it for the purpose of negotiating a collective bargaining contract. An impasse then ensued; whereupon the union either called or threatened to call a strike, and the employer countered by polling the employees directly on whether they favored the union or the company position. In this situation, the question is not whether the poll has a tendency to restrain the employee at the threshold of an organizing campaign, but the entirely different problem of whether, in the circumstances presented, the bypassing of an already recognized bargaining representative would unduly interfere with the employees' right to bargain through representatives. Accordingly, the holdings in these cases, likewise, cannot be controlling here.

CONCLUSION

For the above reasons, it is respectfully submitted that a decree should issue enforcing the Board's order.

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FEBRUARY 1954.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Representations and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a) ; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a) ;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

APPENDIX B

The relevant portion of the Board's decision in *Protein Blenders,* 105 N. L. R. B. No. 136, is set forth below.

[After concluding that certain letters sent to respondent's employees and an anti-union speech preceding the employer-conducted poll were privileged under Section 8 (c) of the Act, the Board continued as follows:]

> The Board is of the opinion, however, that by polling its employees on April 4, 1952, as to whether or not they wanted the Union, the Respondent violated the Act. The Board has often found that employer-conducted polls on union questions constitute unfair labor practices or interference with an election. Upon reconsidering the question of employer polls in the light of the facts of this case and the arguments presented by the Respondent, the Board concludes that in most situations such polls—apart from any other unfair labor practices—are violative of Section 8 (a) (1) of the Act.
>
> The Board's position has consistently been that Section 8 (a) (1) of the Act is violated when an employer questions his employees concerning any aspect of union activities. In explicating its reasons for holding that interrogation of individual employees is unlawful, the Board in the recent case of *Syracuse Color Press, Inc.,* 103 N. L. R. B. No. 26, reaffirmed the view it expressed in the earlier case of *Standard-Coosa-Thatcher,* 85 N. L. R. B. 1358, that "inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or

even knowledge." The Board further emphasized its conclusion that any attempt on the part of an employer to elicit information from employees concerning union activity, regardless of the employer's purpose in seeking such information, is reasonably calculated to arouse the fear that some form of reprisal will follow once the information is obtained.

An oral poll of employees is mass interrogation with the attendant threat of economic detriment to individuals opposing the employer's views concerning concerted activity. A poll by written ballot when conducted by a party interested in obtaining a particular result is susceptible to abuse in presenting the issue to be voted upon in a biased or confusing manner, in impairing the secrecy of the ballot, and in tampering with the results of voting. Even where secrecy of the ballot is in fact preserved and the results of the election are accurately tabulated—as the Respondent contends is the situation in this case—an employer poll may constitute an invasion of the rights guaranteed by Section 7 of the Act. Although the identity of individual union adherents may not be revealed by such a poll and employees may be so assured by the employer, they can never be certain that their vote is secret nor do they have the guarantee of anonymity which is afforded by an election conducted by the Board. The fear of retaliation against the employees as a group, should they oppose the desires of the employer, is also present. Thus even a poll by secret ballot when conducted under the auspices of a partisan employer involves elements of coercion. Declarations that no detriment will result to employees whatever their vote, as made by this Respondent, are ineffective to dispel employees' fears in these circumstances, particularly when the employer at the same time, as here, makes known his strong desire that employees vote against the union

and establishes opposition to the union as the test of loyalty to the employer.

In addition to the coercive effect they have upon the individual voters, employer polls are an effective means of undermining a union and interfering with self-organization of employees. By use of such polls an employer may force a union to a show of strength under conditions within the control of the employer, and at a stage of organization when employees have not had a full opportunity to persuade their fellow employees to their views concerning union activity. Such a premature test tends to frustrate self-organization. Voting results unfavorable to union organization may cause postponement of a request to bargain or the filing of a representation petition, as the Respondent recognized in its letter of April 9, or may provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees. A union's failure to secure a majority vote in such a poll tends to cause union adherents to abandon their support of the union and to discourage undecided employees from joining the union, not as the result of persuasion protected by Section 8 (c) but as the result of conduct reasonably calculated to produce fear.

Where a union has made a claim of majority representation, as in the instant case, an employer by conducting a poll as to whether its employees want to be represented by the union, in effect resolves the question of representation, a function which the Act assigns exclusively to the Board. Determination of a question of representation under conditions controlled by an employer, or, indeed, by a labor organization, rather than by an impartial agency interested solely in safeguarding the fairness of the election, does not guarantee a free expression of employee desires as to representation, nor does it provide for a proper determination of an

appropriate bargaining unit. Employer-conducted elections for the determination of a question concerning representation are an unwarranted private assumption of a function assigned to the Board under the Statute.

For the foregoing reasons we find that the Respondent, by conducting a private poll of its employees to determine their union sentiment, violated Section 8 (a) (1) of the Act, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

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